

In order to establish a prima facie violation of section 105(c)(1) Ms. Perando must prove by a preponderance of the evidence that she engaged in an activity protected by that section and that the discriminatory action taken against her was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case. A miner's "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Such a "work refusal" may be based upon a perceived hazard arising from the miner's own physical condition or limitations. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (1984).

As noted in the decision denying Mettiki's motion to dismiss (8 FMSHRC 364) Ms. Perando first alleges that she suffered unlawful discrimination when she was given less pay upon her transfer from underground work to surface laboratory work after Mettiki officials were informed that she could no longer work underground because of a health impairment, industrial bronchitis, contracted as a result of her underground work at Mettiki.

In this case I find that Ms. Perando had indeed contracted industrial bronchitis from her exposure to coal dust while working at the Mettiki underground mine beginning October 1, 1980. The award to Ms. Perando of Worker's Compensation based on this claim is not disputed and the medical evidence of record supports this finding. Because of this medical impairment, in May 1984 two physicians (Drs. James Raver and Karl E. Schwalum) told Mettiki officials and Ms. Perando that she could, in effect, no longer work in Mettiki's underground coal mine and that she should be placed in a job in which she would not be exposed to coal dust. More specifically this information was reported in a May 14, 1984, letter from Dr. Raver to Mettiki personnel manager Thomas Gearhart.

In a subsequent letter dated June 25, 1984, and also received by Gearhart, Dr. Raver again concluded that Ms. Perando was suffering from industrial bronchitis. He opined that it was "moderate to severe and [was] disabling in terms of her normal ability to work." Dr. Raver also concluded that it "most likely would remain a chronic condition and [would] not clear or be 'cured'."